SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 130

CHRISTINE SNIADACH,

Petitioner,

v.

FAMILY FINANCE CORPORATION of Bay View and MILLER HARRIS INSTRUMENT COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR PETITIONER

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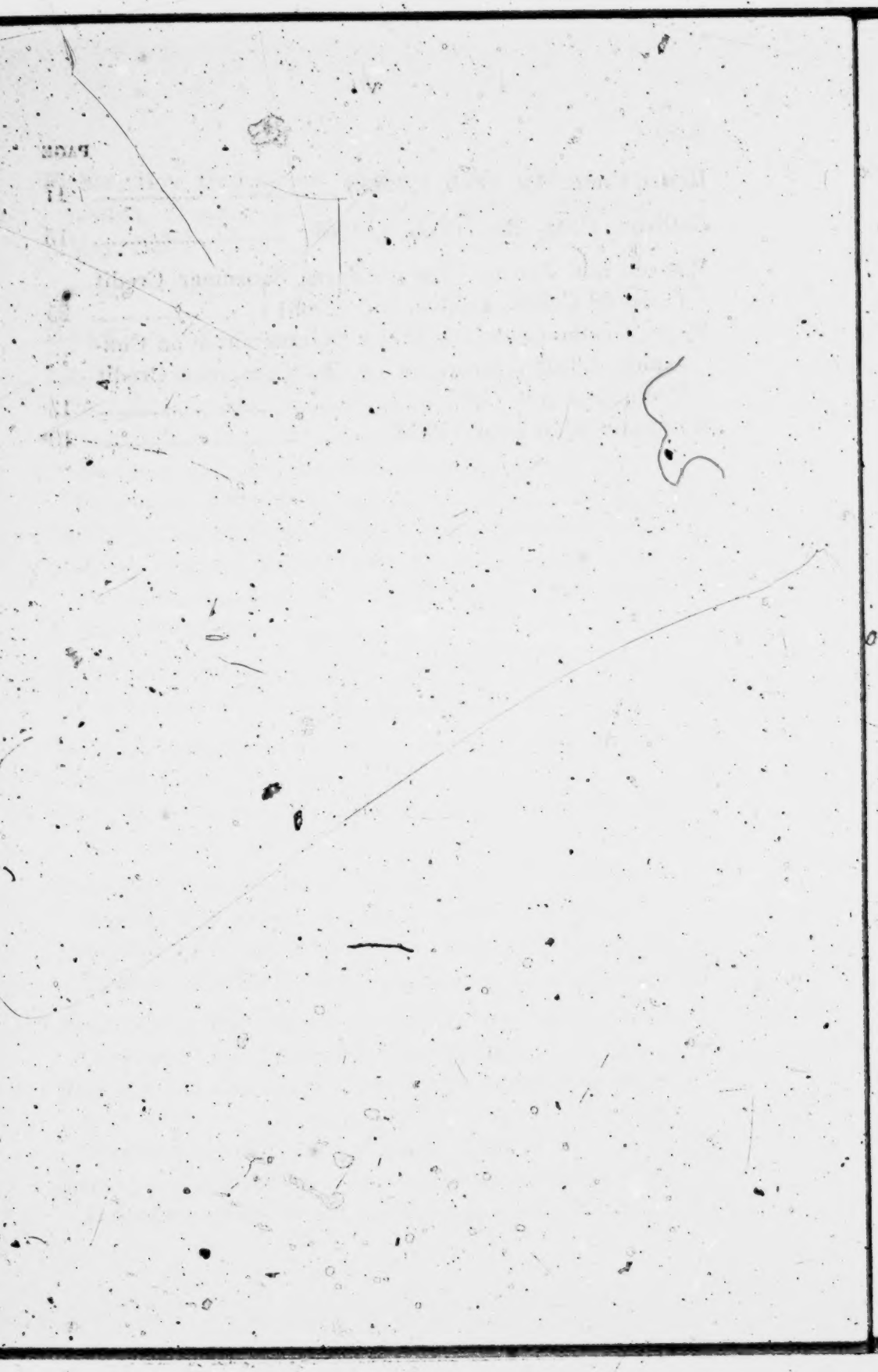

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Opinions Below

The order of the Milwaukee County Court of Wisconsin (R. 118-120; A. 10-11) is unreported. The memorandum decision of the Milwaukee Circuit Court of Wisconsin (R. 101-110; A. 14-23) is also unreported. The decision of the Supreme Court of Wisconsin (R. 126-148; A. 27-51) is reported at 37 Wis.2d 163, 154 N.W.2d 259 (1967).

Jurisdiction

The judgment of the Supreme Court of Wisconsin was entered on December 8, 1967 (A. 26). Rehearing was denied on February 27, 1968 (A. 52). The petition for writ of certiorari, filed May 27, 1968, was granted February 24, 1969 (A. 54). Jurisdiction of this Court rests

on 28 U.S.C. §1257(3), petitioner having asserted below and asserting here the deprivation of rights secured by the Constitution of the United States.

Question Presented

Petitioner is a $65.00 per week wage earner. Half the wages due her were garnisheed before trial by plaintiff in a lawsuit against her. Under Wisconsin law, before petitioner's wages were garnisheed, she had no right to notice and hearing or other procedure for challenging the legality of the garnishment sought by plaintiff. The plaintiff did not have to show that without garnishment, he would be unlikely to obtain jurisdiction over petitioner or to collect a money judgment, nor did he have to show probable cause to believe that petitioner owed him any money, nor any other reason purporting to justify denial of notice and hearing. Does this procedure deny due process of law secured by the Fourteenth Amendment?

Constitutional and Statutory Provisions Involved

1. This case involves the Fourteenth Amendment to the Constitution of the United States.

2. This case involves Wis. Stats. Sections 267.01, 267.02, 267.05, 267.07, 267.13, 267.16, 267.18, 267.20 (1967 Pocket Part). They are set forth in the appendix *infra*, p. 1a.

Statement

Petitioner Christine Sniadach is a wage earner and resident of Milwaukee, Wisconsin. The Family Finance Corporation of Bay View (respondent here), alleging to be her creditor, commenced an action against her for $420.00 in the Wisconsin courts.[1] It also took advantage of the Wisconsin garnishment law, Wis. Stats. Sections 267.01 *et seq.*, to garnishee the wages due her from her employer. All plaintiff did to garnishee petitioner's wages, and all it had to do, was file an attorney's affidavit with the clerk of the County Court, alleging that a summons had been issued in an action by plaintiff against defendant, and that the action was founded upon a promissory note. Wis. Stats. Sections 267.02, 267.04 (A. 5-6). The statute does not require an allegation that the defendant is about to leave the jurisdiction, that an attachment is necessary to obtain jurisdiction, or that but for the garnishment the plaintiff may be unable ultimately to have execution upon a judgment, or any other reason purporting to justify denial of notice and prior hearing. The clerk of the court, on the basis of an attorney's affidavit, ordered petitioner's employer to withhold wages due petitioner.

On November 22, 1966, pursuant to the clerk's summons, petitioner's employer, the Miller Harris Instrument Co., withheld wages due petitioner in the sum of $31.59 and continues to withhold them (A. 7). At no point has petitioner been granted a hearing on whether or not the garnishment was proper, and the statute affords her none until the main action is tried.

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[1] The claim for $420.00 has not yet been decided because it has been stayed pending the outcome of this proceeding involving Wisconsin's pre-judgment garnishment law.

How the Federal Question Was Raised and Decided Below

Petitioner sought by order to show cause in the County Court to dismiss the garnishment on the ground that the Wisconsin procedure for pre-judgment garnishment deprived her of due process of law under the Fourteenth Amendment to the Federal Constitution. Her attorney alleged that the proceedings were "in violation of defendant's constitutional rights under . . . the United States Constitution, Fourteenth Amendment, in that defendant is being deprived of her property without due process of law." Affidavit of Thomas M. Jacobson, dated December 22, 1966 (A. 9). On January 7, 1967, Judge Thaddeus Pruss of the County Court held that "the garnishment action in the instant proceedings does not violate defendant's constitutional rights under . . . the United States Constitution 14th Amendment due process and equal protection" (A. 10-11).

On appeal to the Circuit Court of Milwaukee, petitioner argued that the garnishment statute "deprives the defendant of due process of law in violation of the fourteenth amendment to the United States Constitution because the defendant is given no hearing before being deprived of his property." The Circuit Court affirmed on March 15, 1967, stating that "[d]efendant's argument rejects the fact that nothing has happened to defendant's title except it is temporarily in suspension pending a final adjudication on the debt owed the plaintiff" (A. 14-23).

In the Supreme Court of Wisconsin, petitioner again argued that the garnishment procedure violated due process of law guaranteed to her by the Fourteenth Amendment to the Federal Constitution. On December 8, 1967,

the Supreme Court of Wisconsin affirmed the decision below holding that "Wisconsin's garnishment before judgment statutes do not deprive appellant of her property without due process of law" (A. 27-41). The Court quoted with approval the language of *Byrd* v. *Rector*, 112 W.Va. 192, 163 S.E. 845 (1932):

> [A] defendant is not deprived of his property by reason of the levy of a copy of the attachment upon a person who is indebted to him or who has effects in his custody belonging to the defendant. The most that such procedure does is to deprive defendant of the possession of his property temporarily by establishing a lien thereon . . . Until [a final] judgment is obtained, the defendant's property in the hands of a garnishee is immune from the plaintiff's grasp . . . A. 35).

Two justices of the Wisconsin Supreme Court dissented, arguing that the reasoning of the majority was "most unrealistic. The constitutional question is not whether defendant has lost his title to the property, nor whether another has gained its beneficial use. The test is whether *he* was deprived of his property" (A. 13) (emphasis in original).

Summary of Argument

Garnisheeing the wages of an alleged debtor, without giving him a prior opportunity to show that no debt is due or that the garnishment is otherwise improper, is contrary to public policy and deprives wage-earners of procedural due process of law secured by the Fourteenth Amendment to the United States Constitution. Prejudgment garnishment is widely used by finance companies and collection attorneys for retail stores to force debtors to

settle claims without litigating their possible defenses to the creditors' suits. Not only are alleged debtors under often irresistible pressures to abandon their right to defend actions, they are forced to pay collection fees and other fees demanded by attorneys for the garnisheeing creditors. Prejudgment garnishments have this powerful effect on wage-earners because many employers are so annoyed by the bookkeeping expenses of garnishments that they fire workers who do not settle with their creditors, and settlement often may be the only way to free the impounded wages. Statutory attempts to remedy these abuses have failed, and garnishments are now the predominant factor in inducing bankruptcies in the United States.

The garnishment of wages without a prior adversary hearing is an unconstitutional denial of due process of law, unless the attachment is necessary to obtain *in rem* jurisdiction or is justified by some other evident emergency. For a hundred years this Court has ruled that under ordinary conditions property may not be taken from a person until an adversary hearing is conducted. The cases cited by the court below are distinguishable as cases involving attachments to obtain *in rem* jurisdiction, and the argument of the court below that a "temporary" deprivation is not a deprivation is, as applied to a man's wages, an unrealistic exaltation of superficial logic over substance.

ARGUMENT

Introduction

A significant minority of our citizens believes that the American system of law and government has not corrected and perhaps cannot correct institutional injustices which tend to disadvantage millions of poverty-stricken families in our otherwise affluent society. At least some of their grievances concern governmental actions that also are inconsistent with constitutional standards declared many years ago. This case involves such a situation:

> Among the most intense grievances underlying the riots of the summer 1967 were those which derived from conflicts between ghetto residents and private parties, principally the white landlord and merchant. Though the legal obstacles are considerable, resourceful and imaginative use of available legal processes could contribute significantly to the alleviation of tensions resulting from these and other conflicts. Moreover, through the adversary process which is at the heart of our judicial system, litigants are afforded meaningful opportunity to influence events which affect them and their community. Report of the President's Advisory Commission (Kerner Committee) on Civil Disorders, 292 (Bantam Ed. 1968).

I.

Prejudgment Garnishment Procedure Is Widely Used to Compel Wage Earners to Make Favorable Settlements With Their Alleged Creditors Without Hearing or Trial.

"Garnishment practices in many states allow creditors to deprive individuals of their wages through court action without hearing or trial. In about 20 states, the wages of an employee can be diverted to a creditor merely upon the latter's deposition, with no advance hearing where the employee can defend himself. He often receives no prior notice of such action and is usually unaware of the law's operation and too poor to hire legal defense." Kerner Report 276. This succinct statement describes the problem in this case.

In a garnishment proceeding before judgment, a creditor or alleged creditor is permitted to cause the wages of his alleged debtor to be turned over to the court or held by the employer pending the outcome of the main litigation between creditor and debtor. In Wisconsin, an alleged creditor may avail himself of this preliminary remedy simply by alleging that the debtor owes him a sum due under a contract. Wis. Stats., Sections 267.02, 267.04, 267.05. He need not allege that the defendant is a non-resident, or has left the jurisdiction, or that an attachment is necessary to obtain jurisdiction, or anything else purporting to justify denying a wage-earner the opportunity to be heard in an adversary proceeding before being deprived of his earnings.

The alleged debtor first hears that his wages have been garnisheed when his employer so informs him,[2] and he

[2] The debtor-defendant need not be notified that his wages have been garnisheed until 10 days after the garnishment. Wis. Stats.

has no opportunity to test the existence of the alleged debt or even the validity of the garnishment[3] until after the main action between the plaintiff and the defendant is tried. Wis. Stats. Section 267.16.

The wages for only one salary period are subject to garnishment, Wis. Stats. Section 276.02, and the defendant is entitled to receive from his employer a "subsistence allowance" of $25 or $40 if he has dependents (in no event to exceed 50% of the wages withheld), but this allowance is fixed at the specified levels regardless of whether the wages garnisheed are those owing for a week or a month, Wis. Stats. Section 267,18, and in any event, is "generally insufficient to support the debtor for any one week." Jablonski, "Wage Garnishment as a Collection Device," 1967 Wis. L. Rev. 759, 767.

Forty-one jurisdictions permit prejudgment garnishment. Some of these states, however, allow its use only as an aid to obtaining *in rem* jurisdiction in cases where it is especially difficult to obtain *in personam* jurisdiction over a defendant. Ohio Rev. Code §2715.11 (defendant must be a non-resident); Gen. Stat. N.C. §1-440.2-3 (defendant must have concealed himself to avoid service); Nev. Rev. Stats. §31.010 (defendant must have absconded). We do not take

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Section 267.07. Denial of prior notice of an action against him denies a defendant of due process of law under the Fourteenth Amendment. *Windsor* v. *McVeigh*, 93 U.S. 274, 277, 278 (1876). But our argument, *infra*, is directed primarily to denial of the opportunity to be heard, for notice of an action would be of little value if it did not entail the opportunity to participate in some form of adversary hearing. *Hovey* v. *Elliot*, 167 U.S. 409 (1897).

[3] For example, under Wis. Stats. Section 267.02, prejudgment garnishment may be resorted to only in contract actions and some tort actions. But a defendant in some other type of action has no pre-trial forum in which to complain that whatever the merits of the case, prejudgment garnishment is an impermissible preliminary remedy.

issue with the use of prejudgment garnishment statutes which are so limited as to permit the device solely where it is necessary to obtain jurisdiction. But in those states, such as Wisconsin, where wages may routinely be garnisheed with no prior hearing, alleged debtors are unjustly harassed by creditors and collection lawyers who use the device to collect doubtful debts. See Jablonski, "Wage Garnishment as a Collection Device", 1967 Wis. L. Rev. 759 (1967); Comment, "Wage Garnishment in Washington —An Empirical Study", 43 Wash. L. Rev. 742 (1968).

Garnishment as a Weapon for Collection

"Hundreds of workers among the poor lose their jobs or most of their wages each year as a result of garnishment proceedings. In many cases, wages are garnished by unscrupulous merchants and lenders whose practices trap the unwilling workers." President Lyndon Johnson, Message to Congress on Poverty, March 14, 1967. A significant amount of study has been done on the use and effect of garnishment, and the results indicate that the President's message is, if anything, an underestimation of the seriousness of the problem.

During 1968, the wages of more than 20,000 Wisconsin employees were garnisheed before judgment in the five most populous counties.[4] In virtually all these cases, the

[4] Oral inquiries, Feb. 26, 1969, and Feb. 27, 1969, by petitioner's counsel Thomas M. Jacobson of clerks of five counties representing 40% of the State's population. The following figures were reported: Milwaukee Co. (Francis X. McCormick, Clerk): 11,959 garnishments; Dane Co. (Laurie E. Carlson, Clerk): 3,119; Kinosha Co. (Joe Zuffa, Clerk): 2,225; Racine Co. (Edward Daley, Clerk): 1,451 for six months, or approximately 2.900 for all of 1968; Sheboygan Co. (Ray Marquardt, Clerk): 1,234. The population statistics appear in 1968 Wis. Blue Book 593 (1968). The clerks reported that 95%-99% of the garnishments were prior to judgment or hearing.

complaints against the alleged debtors were "small claims," under $500.00.[5] But the nature of the garnishment process is revealed not so much by the number of persons affected as by a description of who uses it, and why. One study focused on the use of garnishment in four Wisconsin cities, and found that garnishment (particularly prejudgment garnishment) is used not only to secure payment of sums legitimately due, but to force alleged debtors to pay without contesting the debts in court.

> In the four cities studied, money lenders (principally finance companies) and retailers were the two heaviest users of wage garnishments . . . Finance companies have the most developed system of collecting delinquent accounts. Within 10 days after a payment is due, they consider the debtor delinquent and begin efforts to collect. They make use of a large repertoire of collection methods including overdue notices, telephone calls to his employer, calls to cosigners of his note (if any), repossession of the article purchased with the loan (if any), and then wage garnishment. . . . When all other means of reaching the debtor have failed, garnishments usually succeed in forcing him to contact the creditor because he finds himself completely out of funds and his job endangered. Many creditors will release the pay check to the debtor after a token payment plus the promise of modest weekly payments until the debt is repaid. The threat of another garnishment is used to force the debtor to complete his payments. H. Jacob, Usage of Wage Garnishment and Bankruptcy Proceedings in Four Wisconsin Cities, address delivered to the American Political Science Association, September, 1966, pp. 7, 10.

[5] *Ibid.*

A more recent study by the editors of the University of Washington Law Review revealed an even further abuse prevalent in states permitting routine prejudgment garnishment. The device is used not only to force employees to pay debts without contesting them, but to extort from them additional fees which are paid to the alleged creditors and the collection lawyers. "[C]reditors probably initiate the majority of their justice court suits by a prejudgment garnishment because this form of action, combined with low wage exemptions allowed, often applies sufficient pressure to bring the debtor into the creditor's office to arrange a method of paying the debt. . . . Additional charges, including attorney fees, collection charges, interest and service fees, may be added to the original obligation and demanded from the debtor when he comes to the creditor's office." Comment, "Wage Garnishment in Washington—An Empirical Study", 43 Wash. L. Rev. 742, 752 (1968).

Garnishment is an effective weapon in the arsenal of the collection lawyers and finance companies not only because "the individuals whose wages are being garnished are the very individuals whose total wages are required for the payment of necessary living expenses: food, clothing, shelter, and medical expenses,[6] but also because of the widespread practice among employers of firing workers whose wages are garnisheed. "The debtor often may find himself unemployed; employers are often unwilling to accept the additional expense of administering garnishments." Remarks of Congressman Halpern, Cong. Rec., p. H689 (Feb. 1, 1968). "Some companies regard a single garnishment as grounds for discharge . . . it is de-

[6] Testimony of Clive W. Bare, Referee in Bankruptcy, Eastern District of Tennessee, to House Subcommittee on Consumer Affairs, Hearings on the Consumer Credit Protection Act (1967).

tested as an unmitigated nuisance by employers to such an extent that even union contracts tacitly or specifically recognize the right of an employer to discharge an employee whose debts result in more than a prescribed number of garnishments within a specified period." Note, Garnishment in Kentucky—Some Defects, 45 Ky. L. J. 322, 330 (1956). See Fisher, How Garnisheed Workers Fare Under Arbitration, Monthly Labor Review (Dept of Labor, May 1967). Between 100,000 and 300,000 American workers are fired from their jobs each year as a result of wage garnishments. Testimony of Secretary Willard Wirtz to the House Subcommittee on Consumer Affairs, Hearings on the Consumer Credit Protection Act, p. 739 (1967). Thirteen percent of American manufacturing firms fire workers whose wages are garnisheed even once. National Industrial Conference Board Studies In Personnel Policy, No. 194, p. 38, Table 40 (1964). A study of garnishments in Wisconsin showed that 41% of employees in the sample were warned of dismissal if they were again garnisheed; 11% were fired forthwith, and in only 15% of the cases did the employers try to help the workers. Jablonski, "Wage Garnishment as a Collection Device," 1967 Wis. L. Rev. 759, 766, n. 29.[7]

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[7] Section 304 of the Federal Consumer Credit Protection Act prohibits employers from firing workers because of a garnishment "for any one indebtedness." But this section does not and will not solve the problem of firings for garnishment. First, this section of the Act is not effective until July 1, 1970. Second, the section does not prohibit discharge for a second garnishment during the employee's career. And most important, state laws to the same effect (such as McKinney's Cons. Laws of N.Y., C.P.L.R. §5252) have been ineffective. "Since it is nearly impossible for a worker to prove that the garnishment was the cause of his dismissal, employers can usually justify the dismissal of any employee on the grounds of a number of petty infractions of work rules. . . . The only security against firing because of garnishment is abolition of garnishment." Report of the Consumers' Advisory Council, New York City Dept. of Consumer Affairs, on the Uniform Consumer Credit Code, p. 14 (Feb. 3, 1969).

The most gross injustices in cases of discharge as a result of garnishment occur when the garnishments are of the pre-judgment type; there the defendant may have a perfectly good defense to the main lawsuit, or may not even be a debtor, but because he is denied a prior hearing he is threatened with being fired before he can contest the validity of the garnishment. It does not matter to the employer that the worker is innocent—the nuisance to the employer and his bookkeepers is as great. Only by settling immediately with the plaintiff can the employee remove the garnishment and retain his job security.[8]

Under this kind of pressure to avoid continuing garnishment pending extended litigation, it is no surprise that workers obtain money somewhere and settle claims against them, however unjust. Nor is it surprising when a judge of a (Washington) County District Justice Court reports that he recalls "only one case of the 2,600 cases filed in the Everett [County] Court in 1967 in which a defendant went to trial after a prejudgment garnishment." Judge Mark Patterson, "Wage Garnishment—An Extraordinary Remedy Run Amuck", 43 Wash. L. Rev. 735 (1968). Workers subjected to garnishment have no alternative but to pay the amounts claimed; in addition to whatever "collection fees" the creditors' attorneys demand. "The debtor whose wages are tied up by a writ of garnishment, and who is usually in need of money, is in no position to resist demands for collection fees. If the debt is small, the debtor will be under considerable pressure to pay the debt and collection charges in order to get his wages

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[8] Cases have been documented in which employees were fired as soon as their wages were garnisheed, and were able later, at trial, to show that they were not liable. *Milwaukee Journal*, December 10, 1966, §1, at 17, col. 4, cited in Jablonski, *supra*, at 769, n. 42.

back. If the debt is large, he will often sign a new contract or 'payment schedule' which incorporates these additional charges," Comment, "Wage Garnishment in Washington—An Empirical Study", 43 Wash. L. Rev. 742, 753 (1968).

In a significant proportion of the cases, not only the "collection fees" but the underlying debt is subject to a good defense, such as fraud, but the debtor is never able to raise this defense because he cannot afford to wait until trial. "What we know from our study of this problem [in the hearings of the House Subcommittee on Consumer Affairs] is that in a vast number of cases the debt is a fraudulent one, saddled on a poor, ignorant person who is trapped in any easy credit nightmare in which he is charged double for something he could not pay for even if the proper price was called for, and then hounded into giving up his pound of flesh, and being fired besides." Remarks of Representative Leonor Sullivan, Chairman of the House Subcommittee on Consumer Affairs, Cong. Rec. p. H688 (Feb. 1, 1968). Garnishment "is mainly the weapon not of the honest merchant or lender but of the predatory credit sellers who hook a poor, ignorant worker on credit terms which are as devastating to that worker as the dope habit—something he can never seem to lick . . . [W]eep for the inhumanity exposed [in our hearings] about the sewer of the so-called easy credit racket—not legitimate business but the blood suckers of commerce." *Ibid.*

Garnishment and Personal Bankruptcies

It has been established beyond doubt that garnishment —and the accompanying threat of loss of employment— is the triggering cause of most bankruptcies in the United

States.[9] Federal bankruptcy referees have found upon examination of creditors and debtors that "between 60 and 70 percent of bankruptcy filings are the direct result of wage garnishments. Many individuals are being driven into bankruptcy who actually owe relatively small sums, but whose wages are under attachment." Testimony of Clive W. Bare, Referee in Bankruptcy, Eastern District of Tennessee, to House Subcommittee on Consumer Affairs, Hearings on Consumer Credit Protection Act, p. 415 (1967). A direct correlation has been found between the harshness of state garnishment laws and the incidence of filings in bankruptcy.[10] Bureau of Labor Statistics, Fact Sheet No. 4-F, Debt Pooling and Garnishment in Relation to Consumer Indebtedness (1966); see Brunn, Wage Garnishment in California: A Study and Recommendations, 53 Cal. L. Rev. 1214 (1965).

In short, the garnishment procedure is a harsh device used largely by finance companies to collect debts without having to submit to a full hearing in court. Garnishments are a great hardship to wage earners, who cannot afford to lose even 10% or 15% of their wages and still maintain their families, and who are threatened in many instances with being fired if they do not settle with their alleged creditors. As one member of the House Commit-

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[9] In Fiscal 1967, there were 208,329 bankruptcies filed in United States District Courts. Testimony of Royal E. Jackson, Chief, Bankruptcy Division, Administrative Office, U. S. Courts, to the House Subcommittee on Consumer Affairs, p. 416 (1967). 92% of them were filed by consumers rather than businesses. *Ibid.*

[10] "In States such as Pennsylvania and Texas, which prohibit the garnishment of wages, the number of nonbusiness bankruptcies per 100,000 of population are nine and five, respectively, while in those States having relatively harsh garnishment laws, the incidents of personal bankruptcies range between 200 to 300 per 100,000 population." Report No. 1040, House Committee on Banking and Currency, 90th Cong., 1st Sess., p. 21 (1967).

tee on Banking and Currency has stated, "[G]arnishment is an expensive, painful procedure which can cost a man's job. This has come to the attention of this Committee as well as many other Members of Congress. The reports on the riots in Watts, Chicago and other cities, indicate that it costs people their lives." Congressman Frank Annunzio, in House Subcommittee on Consumer Affairs Hearings on Consumer Credit Protection Act, p. 104 (1967). And prejudgment garnishment, by which perfectly innocent employees can be subjected to all the pains and penalties of wage attachments before they are given a chance to say a single word in their own defense, is the harshest type of garnishment. As a Wisconsin Congressman has stated, "The idea of wage garnishment in advance of judgment, of trustee process, of wage attachment, or whatever it is called is a most inhuman doctrine. It compels the wage earner, trying to keep his family together, to be driven below the poverty level." Remarks of Congressman Henry Reuss, Cong. Rec., p. H688 (1968).

But prejudgment garnishment is not only an "inhuman doctrine"; petitioner submits that it is also an unconstitutional deprivation of due process of law secured by the Fourteenth Amendment.

II.

The Use of Prejudgment Wage Garnishment When It Is Not Needed to Obtain *In Rem* Jurisdiction Deprives Employees of Due Process of Law.

We do not assert that garnishment after judgment is unconstitutional, for there the defendant has had an opportunity to raise his claims and defenses in an appropriate adjudicative proceeding. Nor do we claim that prejudgment garnishment is invalid in the rare case where it is necessary to obtain *in rem* jurisdiction in an action where the defendant is not in the state or is for some other reason not within the jurisdiction of the court. We do assert that the deprivation of a man's wages without a prior adversary hearing, unless justified by some evident emergency, is a violation of his rights under the Fourteenth Amendment.

We start with the proposition that no one may be deprived of property by state action unless first given notice and an opportunity to be heard. For example, this Court has struck down a Florida procedure whereby the judgment creditor of a corporation could issue an execution against the property of the owner of unpaid stock, without giving that owner notice or a prior hearing. The owner was held to be "entitled, upon the most fundamental principles, to a day in court and a hearing upon such questions as whether the judgment is void or voidable for want of jurisdiction or fraud, whether he is a stockholder and indebted, and other defenses personal to himself." *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 423 (1915). Absent a prior hearing, the attachment was "repugnant to the 'due process of law' provision of the 14th Amendment, which requires at least a hearing, or an opportunity to

be heard, in order to warrant the taking of one's property to satisfy his alleged debt or obligation . . ." *Ibid.*

The right to be heard in an adversary proceeding before a deprivation of property is one of the essential features of the American legal process. As Mr. Justice Frankfurter said in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 164 (1951), notice and hearing are "prerequisite to due process in civil proceedings." As recently as *Schroeder* v. *New York,* 371 U.S. 208, 212 (1962), this Court has held the right to be heard in civil litigation to be "one of the most fundamental requisites of due process," and has even deemed it to be "the fundamental requisite" of due process, *Grannis* v. *Ordean,* 234 U.S. 385, 394 (1914). See also, *Londoner* v. *Denver,* 210 U.S. 373 (1908); *Morgan* v. *United States,* 304 U.S. 1 (1938); *Southern Ry. Co.* v. *Virginia,* 290 U.S. 190 (1933); *Kelly* v. *Wyman,* —— F. Supp. ——, 37 U.S.L. Week 2324 (S.D. N.Y. 1968) (3-judge court).

The importance of the right to be heard has been explained by this Court in another context: if there is no right, before a deprivation of property, "to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy," there arises the danger of an "arbitrary and baseless" conclusion. *Southern Ry. Co.* v. *Virginia,* 290 U.S. 190, 195-96. There the Court was concerned with a delegation of decision-making power to an administrative agency, which acted without hearing. Here the power to order a garnishment without hearing is given to the Clerk of the County Court, who issues the order perfunctorily; in fact, the statute empowers him to issue signed, sealed, garnishment summoneses *in blank* to creditors' attorneys, upon payment of the required fee. Wis.

Stats. Section 267.04(1). The decisive power in reality remains with the creditor's attorney. Not even an official administrative agency, as in *Southern Ry. Co.*, protects the defendant from an arbitrary deprivation.

We have, therefore, in the Wisconsin procedure, the practice of denying wage-earners the sums due them, without either any prior adversary process or a special justification for summary procedure. The only way in which the Wisconsin Supreme Court was able to hold such a procedure constitutional was to hold that a "temporary deprivation" of property is not a "deprivation" of property. In support of this proposition, it cited three Supreme Court decisions. But it may be seen that these decisions, none of which involved the attachment or garnishment of wages, are more properly viewed as cases dealing with special jurisdictional justifications for prejudgment attachment, and that the due process clause of the Constitution is concerned with realities and not with word-play. The first case cited in the opinion of the Wisconsin Supreme Court is *Ownbey* v. *Morgan*, 256 U.S. 94 (1921). But there the defendant resided in a foreign state. This Court justified the prejudgment attachment on this basis:

> Hence it naturally came about that the American colonies and states, in adopting foreign attachment as a remedy for collecting debts due from *nonresident or absconding debtors*, in many instances made it a part of the procedure that if the defendant desired to enter an appearance and contest plaintiff's demand, he must first give substantial security . . . A property owner *who absents himself from the territorial jurisdiction of a state*, leaving his property within it, must be deemed ex necessitante to consent that the state may subject such property to judicial process or to answer demands made against him in his absence,

according to any practicable method that reasonably may be adopted. 256 U.S. at 105-111 (emphasis added).[11]

Coffin Brothers v. *Bennett*, 277 U.S. 29 (1928), is likewise no authority for the opinion of the Wisconsin Supreme Court. Justice Holmes, writing for the Court, approved a Georgia procedure for the attachment of the stock of liquidated banks. The stock could be attached prior to any hearing on the propriety of the attachment, even though the stockholders were domestic residents. But the opinion of the Georgia Supreme Court makes clear that attachment in such cases had a very special purpose: the attachment was necessary in order for plaintiffs to obtain jurisdiction over defendants.[12] See also *Harris* v. *Balk*, 198 U.S. 215 (1905). But plaintiff in the instant case did not need to garnishee defendant's wages to obtain jurisdiction over her; he had *in personam* jurisdiction.[13]

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[11] Other language in the *Ownbey* case indicates that this Court could not have intended that the principle it was adopting with regard to foreign debtors should apply to wage garnishments even of foreign wage earners. The Court used the term "property" not in its legal sense but in the ordinary sense of "substantial wealth":

> Ordinarily [the requirement that a debtor post bond to dissolve an attachment] is not difficult to comply with—a man who has property usually has friends and credit—and hence in its normal operation must be regarded as a permissible condition. 256 U.S. at 111.

[12] "[The statute] does not provide for rendition of judgments *in personam* against the stockholders of banks which the superintendent of banks has taken control of for the purpose of liquidation, but provides only for summary issuance of executions against stockholders of such banks, as a mode only of commencing against them suits . . ." 164 Ga. 350, 138 S.E. 670, 671 (1927).

[13] Indeed, it is somewhat hard to discern what legitimate purpose underlay plaintiff's decision to garnishee petitioner's wages. It did not need the garnishment for jurisdictional purposes, and petitioner was a domestic resident with roots in the community,

The final authority relied upon by the majority below is *McKay* v. *McInnes*, 279 U.S. 820 (1928), a memorandum decision affirming *McInnes* v. *McKay*, 127 Me. 110, 141 A. 699 (1928), holding Maine's attachment before judgment statute not unconstitutional. The significance of *McKay*, as applied to the present case, however, must be open to some question. *McKay* was submitted on agreed facts to the Maine Supreme Court, and it nowhere appeared whether or not the defendant was a resident of Maine. This Court's citation of *Ownbey* as authority for its affirmance, and its failure to write an opinion, suggests that the Court may have thought that the facts underlying *McKay* were essentially the same as those underlying *Ownbey*. But in the present case, the Court is presented for the first time with the question of the validity of a prejudgment attachment (in this case a wage garnishment) on the basis of a record showing that the defendant's residence and place of employment were within the jurisdiction in which the plaintiff brought his suit, and there is therefore little or no justification for depriving the defendant of his property without any opportunity for a prior hearing.

Futhermore, the applicability to this case of precedents dating even from the 1920's must be subject to some question. The precedents cited by the Wisconsin Supreme Court were suited to borrowers and lenders of substantial wealth. Debtors who had one bank account attached were likely to have others on which they could draw, or other sources of capital; an attchment did not deprive them of their only source of income. Only since the end of World

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including local employment. The amount of the garnishment was only $31.59, which in any event could not afford the plaintiff much security on his alleged $420.00 debt, particularly in view of the fact that Wisconsin law permits an alleged creditor to garnishee wages for one pay period only. Wis. Stats. §267.02(b)(2).

War II has America become a consumer credit economy, in which, quite acceptably, wage-earners are regularly in debt. The outstanding installment debt has grown from 2.5 billion dollars in 1945 to 75 billion dollars in 1967, and will exceed 100 billion dollars by 1970. Caplovitz, *The Poor Pay More,* xvi (Preface to 1967 edition). Petitioner submits that the mechanical application to garnishments in the 1960's of rules of law formulated to govern attachments in the 1920's cannot be justified, even were it not for the fact that the 40 year old cases are all distinguishable.

The remaining argument, then, supporting the validity of the garnishment is that employees whose wages are garnisheed are not "deprived" of their property because the "deprivation" is merely temporary; the wages are held in escrow until the plaintiff's main case is tried, and if the plaintiff is not successful, the garnishment is dissolved.[14]

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[14] This reasoning was relied upon by two supreme courts besides that of Wisconsin, although Wisconsin's is the only Supreme Court to apply it to wage garnishment. The Supreme Court of West Virginia has reasoned:

> The most that such procedure does is to deprive defendant of the possession of his property temporarily by establishing a lien thereon. [Until final judgment] there has been no deprivation of property . . . Until such judgment is obtained, the defendant's property in the hands of a garnishee is immune from the plaintiff's grasp. Under no circumstances could it be converted into cash and applied to the plaintiff's demand prior to final adjudication of the merits of the controversy between plaintiff and defendant. *Byrd* v. *Rector,* 112 W.Va. 192, 163 S.E. 845 (1932).

And the Supreme Court of Maine, while conceding that "Deprivation does not require actual physical taking of the property or thing itself. It takes place when the free use and enjoyment of the thing or the power to dispose of it at will are affected," upheld prejudgment attachment by adding "yet conditional and temporary it is." *McInnes* v. *McKay,* 127 Me. 110, 116, 141 A. 699, 702 (1928).

But the due process clause of the Fourteenth Amendment addresses itself not to "drily logical" analysis or "scholastic interpretation," see *Noble State Bank* v. *Haskell*, 219 U.S. 104, 110 (1911), but to realities. And nothing is more real to a wage earner whose wages have been garnisheed than impairment of his ability to care for his family and meet the demands of his other creditors. It matters little that the plaintiff has no use of the defendant's wages; the important fact is that the defendant has no use of them. And, unlike attachment of stock or other assets of a wealthy man, loss of wages to a wage earner is likely to result in a financial squeeze seriously affecting his power to feed, clothe and shelter his dependents.[15] Nor is the "temporary" nature of the deprivation a satisfactory response; given the time required for discovery and the crowded condition of court dockets, it may be years before the main action comes to trial. During this period, the wage earner loses the difference—measurable as interest—between the present and future value of the wages due him. More important, the garnishment, valid or not, keeps a defendant under pressure to settle the lawsuit on terms favorable to the alleged creditors, even if he has a perfect defense. It is no comfort to a wage earner that, like any attachment, a garnishment "does not destroy title or the right to sell. Until a sale of execution, the debtor has full power to sell or dispose of the property attached without disturbing the possession (in case of personalty) or rights acquired by the attachment." *McInnes* v. *McKay*, 127 Me. 110, 115, 141 A. 699,

[15] "For a poor man—and whoever heard of the wages of the affluent being attached?—to lose part of his salary often means his family will go without the essentials. No man sits by while his family goes hungry or without heat. He either files for consumer bankruptcy, and tries to begin again, or just quits his job and goes on relief. Where is the equity, the common sense in such a process?" Remarks of Congressman Gonzales, Cong. Rec. p. H690 (Feb. 1, 1968).

702 (1928). Even in jurisdictions which do not forbid wage assignments, there is no real market for wages currently attached, which the alleged debtor may never become entitled to. The Wisconsin Supreme Court's conception of what constitutes a "deprivation" of property is archaic and unrealistic, ignoring the difference in value between a sum of money and the right to future possession of that sum. It prevents thousands of wage earners each year from receiving the fair play to which our legal system entitles them.

CONCLUSION

"[N]ational, state and local governmental policies promote the training and equipping of people to obtain and hold jobs so that they can support their families as productive members of society and not increase the huge welfare burden that the taxpayer now bears. Much of the structure of our present creditors' remedies laws is inconsistent with this objective. . . . Garnishment laws that allow creditors to tie up income necessary to support the debtor's family—often even before an adjudication of the debtor's rights—and to interfere with the debtor's employment relationship are inimical to prevailing governmental policy." Warren and Jordan, "The Uniform Consumer Credit Code", 68 Colum. L. Rev. 387, 438 (1968).

In this instance, settled principles of constitutional law require a remedy for the evil. The judgment below should be reversed.

Respectfully submitted,

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APPENDIX

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Statutory Provisions Involved

This case involves the following statutes of the State of Wisconsin:

(a) Wis. Stat. §267.01 (1967 Pocket Part)

(1) Any creditor may proceed against any person who is indebted to or has any property in his possession or under his control belonging to such creditor's debtor, as prescribed in this chapter. "Plaintiff" as used in this chapter includes a judgment creditor and "defendant", a judgment debtor.

(2) Except as otherwise provided in this chapter, the procedure in garnishment actions shall be the same as in ordinary civil actions.

(2a) A garnishment action is a separate action.

(3) An individual may commence a garnishment action in his own person and in his own behalf, or by an attorney licensed to practice in the courts of this state, but not otherwise. Garnishment actions on behalf of any other party shall be commenced only by attorneys licensed to practice in the courts of this state.

(4) No garnishment action shall be brought to recover the price or value of spirituous, malt, ardent or intoxicating liquors sold at retail.

(b) Wis. Stat. §267.02 (1967 Pocket Part)

(1) A plaintiff may commence a garnishment action at any time after:

Statutory Provisions Involved

(a) A summons is issued: 1. In an action for damages founded upon contract, express or implied (or in a contract action where a writ of attachment could issue on demands not yet due under s. 266.03(3)). 2. In an action upon a judgment. 3. In a tort action where a writ of attachment could issue under s. 266.03(2).

(b) An execution upon an in personam judgment is issuable.

(2) If wages or salary are the subject of a garnishment action, and payment of wages or salary to the defendant is, has been, or should be, withheld therein, plaintiff may not commence any other garnishment action affecting the wages or salary of the principal defendant prior to judgment in the principal action.

(3) Except as provided in sub. (2), the plaintiff may, in like manner, subsequently proceed against other garnishees, or, if he has reason to believe they have subsequently become liable, against the same garnishee.

(c) Wis. Stat. §267.04 (1967 Pocket Part)

(1) Upon payment to the clerk of a clerk's fee of $2 and a suit tax of $1, the clerk shall issue a garnishee summons together with sufficient copies to the plaintiff or his attorney; the summons form may be in blank, but must carry the court seal.

(c) Wis. Stat. §267.05 (1967 Pocket Part)

(1) The garnishee complaint in a garnishment action before judgment must allege the existence of one

of the grounds for garnishment mentioned in s. 267.02(1)(a), the amount of the plaintiff's claim against the defendant, above all offsets, known to the plaintiff, and that plaintiff believes that the named garnishee is indebted to or has property in his possession or under his control belonging to the defendant (naming him) and that such indebtedness or property is, to the best of plaintiff's knowledge and belief, not exempt from execution.

(d) Wis. Stat. §267.07 (1967 Pocket Part)

(1) Except as provided in s. 267.05(4), the garnishee summons and complaint shall be served on the garnishee as required for the exercise of personal jurisdiction under ch. 262, and notice of such service in susbtantial conformity with sub. (4), or a copy of the garnishee summons and complaint, together with the summons in the principal action, shall be served on the principal defendant as required for the exercise of personal jurisdiction under ch. 262, not later than 10 days after service on the garnishee as provided in s. 262.06.

(e) Wis. Stat. §267.13 (1967 Pocket Part)

(1) If the answer shows a debt due to the defendant, the garnishee may pay the same or sufficient thereof to cover the claim of the plaintiff, as stated in the garnishee complaint, with interest and costs, to the clerk of the court. If prior to so doing, the plaintiff in writing requests the garnishee to pay such sum to such clerk, the garnishee shall, within 5 days after receipt of such request, pay the sum to the clerk. The clerk shall give his receipt therefor to the

garnishee. Such payment shall discharge the garnishee of all liability for the amount so paid.

(2) If the debt disclosed is not due, this section shall apply when it becomes due, with like effect.

(3) If the garnishee fails to pay such sum within 5 days after receipt of such request, the plaintiff shall be entitled to judgment against the garnishee for the amount disclosed, when due, either before or after judgment in the original action and may collect the same by execution; but in case no judgment has been rendered in the principal action the execution against the garnishee shall require the sheriff to pay the money collected into court to abide the event of the principal action. Moneys paid into court shall be paid to the plaintiff when final judgment is rendered in his favor, and to the extent of satisfying the same, upon order of the court, and any balance to the party entitled thereto.

(4) If no such request is made and the garnishee does not elect to pay such sum to the clerk, the garnishee shall hold the same until order of the court. No stipulation between the plaintiff and the defendant shall be honored by the garnishee, until signed and approved by the court.

(5) If judgment is against the plaintiff such moneys shall be paid to the defendant.

(f) Wis. Stat. §267.16 (1967 Pocket Part)

(1) No trial shall be had of the garnishment action until the plaintiff has judgment in the principal action and if the defendant has judgment the garnishment action shall be dismissed with costs.

(2) The court may adjudge the recovery of any debt, the conveyance, transfer or delivery to the sheriff or any officer appointed by the judgment of any real estate or personal property disclosed or found to be liable to be applied to the plaintiff's demand; or by the judgment pass the title thereto; and may therein or by its order direct the manner of making sale and of disposing of the proceeds thereof, or of any money or other thing paid or delivered to the clerk or officer. The judgment against a garnishee shall discharge him from all demands by the defendant for all property paid, delivered or accounted for by the garnishee, by force of such judgment.

(g) Wis. Stat. §267.18 (1967 Pocket Part)

(1) From the time of the service of the summons and complaint upon the garnishee he shall stand liable to the plaintiff for the property then in his possession or under his control belonging to the defendant or in which he is interested to the extent of his right or interest therein and for all his debts due or to become due to the defendant, except such as are exempt from execution, but not in excess of the amount of the plaintiff's claims as disclosed by his garnishee complaint together with 25 per cent of the amount claimed in the garnishee complaint but not less than $25 nor more than $500 to secure costs.

(2) (a) When wages or salary are the subject of garnishment action, the garnishee shall pay over to the principal defendant on the date when such wages or salary would normally be payable a subsistence allowance, out of the wages or salary then owing, in the sum of $25 in the case of an individual without

dependents or $40 in the case of an individual with dependents; but in no event in excess of 50 per cent of the wages or salary owing. Said subsistence allowance shall be applied to the first wages or salary earned in the period subject to said garnishment action.

(b) If the court determines that the principal defendant is entitled to an exemption in excess of the subsistence allowance paid over or to be paid over pursuant to this subsection, such subsistence allowance shall be set off and applied against said exemption. If the court determines that the principal defendant is entitled to an exemption less than the subsistence allowance paid over or to be paid over pursuant to this subsection, such subsistence allowance shall be the exemption to which the principal defendant is entitled in such garnishment action.

(h) Wis. Stat. 267.20 (1967 Pocket Part)

Except upon the order of a judge no action shall be commenced by the defendant or his assignee against a garnishee upon any garnished claim or demand or to recover any property garnished, or execution be issued upon a judgment in favor of defendant against such garnishee, until the termination of the garnishment; and if an action has been commenced or an execution issued it shall be stayed by the court or a judge thereof as to the garnishee upon his application.